

# **Economic Nexus and Marketplace Collection for Sales Tax**

*(Version Date: September 10, 2018)*

## **Section 1. Economic Nexus Standard for Sales and Use Tax Collection**

Notwithstanding any other provision of law, any \_\_\_\_\_ [vendor, seller, marketplace facilitator, or appropriate state-law term] selling or facilitating the sale of tangible personal property \_\_\_\_\_ [and/or other property or services subject to sales tax in the State] for delivery into [State] is ["doing business in this state"], is subject to \_\_\_\_\_ [pertinent sales tax code sections], shall [collect and remit/pay] applicable sales or use tax, and shall follow all applicable procedures and requirements of law, provided the [seller, vendor, marketplace facilitator] meets any of the following criteria in the previous calendar year or the current calendar year:

- A. If a [seller], the [seller] makes sales of tangible personal property [and/or other property or services subject to sales or use tax in the State] for delivery into this state exceeding [100,000] dollars or in [two hundred] or more separate transactions.
- B. If a [marketplace facilitator], the [marketplace facilitator] makes or facilitates the sale of tangible personal property [and/or other property or services subject to sales tax in the State], on its own behalf or on behalf of one or more marketplace sellers, for delivery into this State exceeding [100,000] dollars, or in [two hundred] or more separate transactions.

## **Section 2. Imposition of Sales and Use Tax Collection on Marketplace Facilitators**

- A. "Marketplace facilitator" means a person that contracts with sellers to facilitate for consideration, regardless of whether deducted as fees from the transaction, the sale of the seller's products through a physical or electronic marketplace operated by the person, and engages:
  - 1. Directly or indirectly, through one or more affiliated persons in any of the following:
    - a. Transmitting or otherwise communicating the offer or acceptance between the buyer and seller;
    - b. Owning or operating the infrastructure, electronic or physical, or technology that brings buyers and sellers together;
    - c. Providing a virtual currency that buyers are allowed or required to use to purchase products from the seller; or
    - d. Software development or research and development activities related to any of the activities described in (2.) of this subsection (A), if such activities are directly related to a physical or electronic marketplace operated by the person or an affiliated person; and
  - 2. In any of the following activities with respect to the seller's products:
    - a. Payment processing services;
    - b. Fulfillment or storage services;

- c. Listing products for sale;
  - d. Setting prices;
  - e. Branding sales as those of the marketplace facilitator;
  - f. Order taking;
  - g. Advertising or promotion; or
  - h. Providing customer service or accepting or assisting with returns or exchanges.
- B. "Marketplace seller" means a seller that makes retail sales through any physical or electronic marketplaces operated by a marketplace facilitator.
- C. A marketplace facilitator [doing business in the state under Section 1] is required to [collect and remit/pay] the [sales or use tax] on all taxable sales to customers in this state. However, a marketplace facilitator is not required to [collect and remit/pay] sales or use tax on a sale from a marketplace seller to a customer in this state if the marketplace facilitator elects to request and maintain a copy of the seller's registration to collect sales and use tax in this state. Nothing in this Section shall be construed to interfere with the ability of a marketplace facilitator and a marketplace seller to enter into agreements with each other regarding fulfillment of the requirements of this [Chapter].
- D. A marketplace facilitator is relieved of liability under this [section] for failure to collect and remit tax to the extent the marketplace seller or customer has remitted the sales or use tax at issue.
- E. A marketplace facilitator is relieved of liability under this [section] for failure to collect and remit the correct amount of tax to the extent that the error was due to incorrect information given to the marketplace facilitator by the marketplace seller. Provided, however, this [subsection] shall not apply if the marketplace facilitator and the marketplace seller are related as defined in [cite code section].
- F. Marketplace facilitators shall report the sales and use tax described in [this section] separately from any sales or use tax collected on taxable [retail sales] made directly by the marketplace facilitator, or affiliates of the marketplace facilitator, to customers in this state using a separate marketplace facilitator [return/report/form] to be published by the [department].
- G. No class action may be brought against a marketplace facilitator in any court of this state on behalf of customers arising from or in any way related to an overpayment of sales or use tax collected on sales facilitated by the marketplace facilitator, regardless of whether that claim is characterized as a tax refund claim. Nothing in this subsection affects a customer's right to seek a refund as provided under section [x].
- H. Nothing in this section affects the obligation of any consumer to remit sales or use tax for any taxable transaction for which a marketplace facilitator or seller does not collect and remit sales or use tax.
- I. Nothing in this section shall prohibit the [department] from auditing marketplace facilitators or marketplace sellers, except the [department] is prohibited from auditing:
- a. Marketplace facilitators to the extent that the marketplace seller collected and remitted sales tax and was audited for such sales; and

- b. Marketplace sellers to the extent that the marketplace facilitator collected and remitted sales tax and was audited for such sales unless the marketplace facilitator is seeking relief of liability under subsection (D) of this section.
- J. If a marketplace facilitator pays sales or use tax on a [retail sale] facilitated for a marketplace seller as a result of an audit or otherwise, the marketplace facilitator shall have the right to recover such tax and any associated interest and penalties from the marketplace seller within the applicable statutory period following the date of payment by the marketplace facilitator.
- K. The [department] shall waive penalties and interest if a marketplace facilitator seeks liability relief and the department rules that a reasonable cause exists.

### **Section 3. No Retroactive Application**

No obligation to collect the sales and use tax required by this Act may be applied retroactively.

### **Section 4. Severability**

If any provision of this act, or the application of such provision to any person or circumstance, is held to be unconstitutional, then the remainder of this act, and the application of the provisions of such to any person or circumstance, shall not be affected thereby.